93-234

NO.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

JAMES OLIVER SINGLETON,

PETITIONER

v.

HARRY STILES, ET AL

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

[Rule 14.1(a)]

1. Whether the requirements of Batson v. Kentucky[1] were complied with; and

2. More significantly, whether Batson v. Kentucky and its progeny have proved unworkable as a means to end racial discrimination in jury selection, and whether peremptory strikes should be abolished as suggested by the late Justice Thurgood Marshall in his dissenting opinion to Batson.

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[1]Batson v. Kentucky, 476 U.S. 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986)

II

PARTIES TO THE PROCEEDINGS

The Petitioner is James Oliver Singleton.

The Respondents are Harry Stiles and Kenneth Ramsey.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Statement of the Case 1

Argument 5

Peremptory Challenges Should Be Abolished 7

Reason for Granting 10

Conclusion 11

Appendix A A-1

TABLE OF AUTHORITIES

Page

Cases

Batson v. Kentucky, 476 U.S. 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986) 1

Edmonson v. Leesville Concrete Company, Inc., 500 U.S.___, 114 L Ed, 2d 660, 111 S Ct 2077 (1991) . . 1

Powers v. Ohio, 499 U.S. _____, 113 L Ed 2d 411, 111 S Ct 1364 (1991) . . 4

United States v. Roberts, 913 F.2d 211, 213 (5th Cir. 1990) 6

Constitution, statutes and regulations:

28 U.S.C. Sec. 1254(1) 1

28 U.S.C. Sec. 1291 1

28 U.S.C. Sec. 1343(a)(3) 1

42 U.S.C. Sec. 1983 1

NO.

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JAMES OLIVER SINGLETON,

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mark W. Stevens, on behalf of James Oliver Singleton, petitioner for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

This is a statutory application for writ of certiorari under 28 U.S.C. Sec. 1254(1). The underlying action was a civil rights damage case under 42 U.S.C. Sec. 1983.

JURISDICTION

Original jurisdiction was provided by 28 U.S.C. Sec. 1343(a)(3). The Court of Appeals had jurisdiction under 28 U.S.C. Sec. 1291. Final judgment was entered July 31, 1992.

Notice of Appeal was filed August 26, 1992. The Court of Appeals issued its opinion April 19, 1993. (Appendix)

STATEMENT

This is, first and foremost, a Batson[2] case. The particular circumstances of this case not only require reversal, but present a compelling argument for the implementation of more definite procedures for enforcement of racial non-discrimination in jury selection, and indeed suggest that the step recommended by the late Justice Thurgood Marshall in his Batson concurring opinion -- abolition of peremptory strikes -- should be adopted.

Petitioner Singleton alleged and produced evidence that the defendants had consciously and illegally harassed him in violation of 42 U.S.C. Sec. 1983.

A Batson challenge was asserted at p.75/20

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[2]Batson v. Kentucky, 476 U.S.79, 90 L Ed 2d 69, 106 S Ct 1712 (1986); Cf. Edmonson v. Leesville Concrete Company, Inc., 500 U.S. ___, 114 L Ed 2d 660, 111 S Ct 2077 (1991); Powers v. Ohio, 499 U.S. ____, 113 L Ed 2d 411, 111 S Ct 1364 (1991).

(References are to the record) and overruled at 79/15. The Juror in question was No. 8, Ralph Gracia (occasionally referred to as "Garcia" in the record). Mr. Garcia made only one response to the Voir Dire conducted by the Court. At p. 53 of the Voir Dire, Gracia responded to a routine question about military service indicating (as he had on his jury form) that he had served four years in the U.S. Air Force, and was honorably discharged. His information form reveals that he was 61 years old, a civil engineer by training, and employed by the U.S. Army Corps of Engineers.

At 77/18, the Court asked of Petitioner's counsel, "...what is there about him [Gracia] that you can point to, if anything, that has to do with the attitudes, ideas, experiences that run through the Hispanic Community that's going to make a prima facie case that we should treat this as an illegal strike." If by this the Court suggested that a causal link had to be shown between the strike and the anticipated

subject matter or potential outcome, it was an error in conception which may have affected the final ruling. As noted, Batson and its progeny are not "outcome oriented", but seek to vindicate the rights of venire members. See Powers v. Ohio, 499 U.S. _____, 113 L Ed 2d 411, 111 S Ct 1364 (1991).

Defense counsel attempted to articulate a "race neutral" reason for the strike at 76/9: "...Well...it was a kind of a mix of things...his demeanor and answer to certain ...to mention of constitutional claims and police officers...and that type of thing as I understand it." When asked for particulars, defense counsel continued, "...the fact that he was an engineer...and some of our collective experience with engineers on the jury...they're kind of an unknown quantity." (Emphasis added)

When the Court ruled, it did so in a manner which fell a step short of its duty under Batson. Although the Court appeared to recognize properly that a strike against the

sole member of the Hispanic race on the panel was prima facie improper (78/14), and correctly noted that the fact that he was an engineer in and of itself would not suffice, it went on to state at 78/23:

> Okay. Well, whatever. I think I'm going to rely on counsel for the Defendants in their interpretation of his answering questions. If they have picked on tentativeness on his part to do so, I think there's sufficient law that will support their *using that to avoid Batson*. So I'm not going to find that it was pretextually done and as a consequence I'm going to deny any relief under Batson as to the juror Mr. Gracia. (Italics added)

ARGUMENT

The cases which the Trial Court probably had in mind may have had the effect of enabling litigants to "avoid" Batson, but such cannot have been their intent nor was it their precise

holding. Appellate cases under Batson which affirm the results below almost invariably take the form of a case-by-case analysis, granting the trial court "great deference". See United States v. Roberts, 913 F.2d 211, 213 (5th Cir. 1990). Such deference presupposes (1) a finding by the trial court of the subjective intent behind the strike in question, (2) based in some rational manner on the record. Neither was present in the case under consideration.

To the extent that the Court may have relied upon counsel's references to Gracia's answers to questions about police and constitution claims, the any such "finding" would be unsupported by the record. As noted, Gracia responded only to one question, that about military service.

The Court's inverse "finding" that the strike was not pretextual missed the mark more fundamentally. Although the word "pretext" is frequently used in Batson decisions, there is no explicit duty on the challenger to prove pretext

as perhaps is the case as in somewhat analogous Title VII employment proceedings. Batson is not about finding and relying upon cases, like legal foxholes, in which one may "avoid" some inconvenient constitutional requirement. It is about judges making findings of fact, based upon their experience and the record of voir dire, as to the subjective motivation for challenged strikes.

Peremptory Challenges Should be Abolished

Batson continued more than a century of efforts to rid the jury selection and trial process of racial discrimination. In his concurring opinion to Batson, the late Justice Thurgood Marshall accurately predicted the troubles to follow, e.g., specious rationales for strikes, an inconvenient and unworkable mechanism for enforcement, and frankly called for the abolition of the vehicle--peremptory strikes--in which the evil of trial discrimination was conveyed.

Several aspects of this case illustrate the

difficulties. Batson itself arose from a Kentucky prosecution in which, apparently, there was a relatively open voir dire conducted by counsel. Batson cases arising in Texas state courts certainly allow both counsel to develop, in direct voir dire conducted by counsel one-on-one with venirepersons. Such procedures give a semblance of rationality to trial judges' findings that adverse demeanor was present and hence was the reason for a challenged strike. However, federal courts, with a proper eye towards judicial economy and under the burden of expanding dockets, have opted for relatively abbreviated voir dire conducted by the courts based on written questions submitted by counsel in advance. At no time will counsel have an opportunity to test the personality of panelists by direct questioning; diffidence or halting demeanor in too many cases may well be the result of jurors' reactions to their only direct contact with federal judges and magistrates, known to the jurors to be possessed with considerable

power and authority, or the frankly impressive surroundings of most federal court rooms. Records are frequently inadequate for Batson purposes. In the present case, whether counsel did or did not observe some degree of nonverbal diffidence or uneasiness on the part of Mr. Gracia simply cannot be determined from the record. In no other area do we allow the simple incantations of a party litigant to substitute for some indication, in the record, that his observations were correct.

The question of ethnic identification will increasingly come to bedevil the courts attempting to enforce Batson. It will be noted that defense counsel asserted, unsuccessfully, that Mr. Judia (Juror No. 9) was also Hispanic, presumably because his name ended in a vowel. Nobody asked Mr. Judia his racial affiliation, nor should they have been required to. An increasing number of Americans share what others, not so distinguished, refer to as "mixed" descent between parents of distinctive

races. Such people frequently will not bear the distinctive physical characteristics of any one race and are certainly entitled not to discuss their backgrounds in that regard. Nonetheless, they will frequently be subjected, as veniremen, to racially motivated strikes, and will be shown the door following denial of the privilege of jury service, an essential element of their franchise as citizens.

The real evil under Batson is the peremptory strike. This practice derives its acceptance solely from its antiquity.

If the merits of peremptory strikes are debatable, the burdens must be all too obvious. Their chief demonstrable functions now appear to be as a spacious vehicle in which the last vestiges of racial discrimination in the courthouse are allowed to hide, lurking behind the "great deference" standard of review and the practical necessity of trial and appellate judges to attend to their ever lengthier dockets.

As such, the practice of peremptory strikes should be condemned as inherently violative of the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fifth Amendment, and should be struck from the practice of all State and Federal Courts.

REASON FOR GRANTING

This case is not about the rights or sensibilities of James Oliver Singleton, who, like all other litigants, will never be persuaded that his trial was "fair" if he turns out to be the loser. Batson is about the integrity of our jury system and the necessity of maintaining the confidence of all sectors of the public in it.

The devices adopted under Batson and subsequent cases have failed, as witnessed (1) by the relative paucity of cases reversing on Batson grounds, and (2) the vision of very fine judges such as the one in the case at bar, frankly finding in Batson decisions means whereby litigants may "avoid" Batson and its commandment, a view apparently shared by a large part of the

trial bar.

CONCLUSION

The decision of the Court of Appeals should be REVERSED and the case remanded for new trial under instructions that no peremptory challenges are to be permitted.

Respectfully submitted,

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October 1993

Appendix A

Filed April 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7573
Summary Calendar

JAMES OLIVER SINGLETON,

Plaintiff-Appellant,

VERSUS

HARRY STILES,
KENNETH RAMSEY,
and LARRY BULLARD

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
(CA-G-86-399)

Before JOLLY, DUHE, and BARKSDALE,
Circuit Judges.
DUHE, Circuit Judge:[1]

After a jury trial of this civil rights case, the court entered judgment for defendants-appellees in accordance with the verdict. Plaintiff James Oliver Singleton appeals on the grounds that a peremptory strike of a Hispanic venireman violated Batson[2] and that the court improperly denied leave to amend the complaint to add a defendant. We affirm.

I.

Plaintiff objected at trial to Defendants' peremptory challenge of the only Hispanic person on the jury venire. Batson and its progeny prohibit peremptory challenges of prospective jurors based solely on their race on equal protection grounds. Batson, 476 U.S. at 89; see also Edmondson v. Leesville Concrete Co., 111

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

S.Ct. 2077 (1991); Powers v. Ohio, 111 S.Ct. 1364 (1991). In the fact of the Batson challenge, Defendants-Appellees' attorneys offered as race-neutral explanations for the peremptory strike the juror's demeanor, tentativeness, and employment as an engineer.[3]

"Unless a discriminatory intent is inherent in the counsel's explanation, the reason offered will be deemed race neutral." Hernandez v. New York, 111 S.Ct. 1859, 1866 (1991). Peremptory strikes based on demeanor are valid race-neutral explanations for a peremptory strike. E.g., Hernandez, 111 S. Ct. at 1867 (demeanor and responses). Plaintiff's objection relating to the venireman's forthright answer to the only question asked him does not recognize that observations of demeanor are beyond spoken words

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[3] Defense counsel responded that "it was kind of a mix of things: his demeanor and answer to certain -- to the mention of constitutional claims and police officers and that type of thing. . . ." (7 R.76). Upon request for more explanation on demeanor, counsel explained that the juror "was very tentative. . . when he was raising his hand. We weren't sure if he'd ever made his mind about anything." (7 R. 76-77). Additionally counsel asserted that in its "collective experience with engineers on the jury, they're kind of an unknown quantity." (7 R. 76).

and therefore are not reflected in the written record.

Defendants articulated a second race-neutral explanation for striking the juror, namely, past experience of counsel with jurors of his employment background. Employment background is also an acceptable explanation for a peremptory strike. United States v. De La Rosa, 911 F.2d 985, 990-991 (5th Cir. 1990), cert. denied, 111 S.Ct. 2275 (1991); United States v. Moreno, 878 F.2d 817, 820-21 (5th Cir.), Cert. denied, 493 U.S. 979 (1989). "'Valid reasons for exclusion may include "intuitive assumptions" upon confronting a venireman.'" Moreno, 878 F.2d at 821 (quoting United States v. Terrazas-Carrasco, 861 F.2d 93, 95 (5th Cir. 1988)). We afford great deference to the trial court's acceptance of these race-neutral explanations for the peremptory challenge. Hernandez, 111 S.Ct. at 1868-71, (reviewing for clear error); United States v. Lance, 853 F.2d 1177, 1181 (5th Cir. 1988) ("either a 'clearly erroneous' or 'great def-

erence' standard"); Moreno, 878 F.2d at 821 (great deference).

Plaintiff argued that the fact that the juror was an engineer was a pretext because "other engineers on the panel . . . weren't struck for that reason." 7 R. 78. The record reflects that two other jurors who indicated engineering in their type of work were also peremptorily struck: Juror Dooley ("Design Eng. & Survey") by Plaintiff, and Juror Brunt ("Engineering Manager") by Defendants. Juror Crouch, a retired "Engr. Mgr.," was stricken for cause. See 1 R. 632-36. Plaintiff has not shown Defendants' reasons to be pertextual. We agree with the trial court that Plaintiff has not shown purposeful discrimination.

II.

Plaintiff also argues that we should abolish peremptory strikes on equal protection ground. The Batson decision "enforces the mandate of equal protection" without abolishing peremptory strikes. Batson, 476 U.S. at 99; see

also id. at 98 n.22. We will not deviate from Batson's established mechanism for analyzing a peremptory strike for equal protection violations.

III.

This case was originally filed pro se in 1981. Some ten years later, after counsel was appointed for Plaintiff, he moved to amend his pleading to add the City of Freeport, Texas, as a defendant under a theory of municipal liability. The court carefully considered the relation-back principles of Rule 15(c),[4] the appli-

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[4] The Rule provides in part,

> An amendment of a pleading relates back to the date of the original pleading when
>
> . . .
>
> (2) the claim . . . asserted in the amended pleading arose out of the conduct . . or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and . . .the party to be brought in by amendment (A) has received such notice . . . that the party will not be prejudiced in maintaining a defense . . . and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c).

cable statute of limitations, Kirk v. Cronvich,[5] and the allegations of the earlier pleadings. Giving due consideration to Plaintiff's pro se status and not holding Plaintiff to strict compliance with the rules of pleading, the court nevertheless concluded that the addition of a party "never intended" to be part of Plaintiff's complaint was beyond the requirements of Rule 15 and would disrespect the statute of limitations. 2 R. 447-444. No mistaken identity within the meaning of Rule 15(c)(3)(B) occurred. Plaintiff has shown no error in the court's conclusion.

IV.

Finding no Batson violation and no error in the denial of leave to amend, we affirm.

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[5] Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980) (allowing amended complaint substituting sheriff individually and in official capacity to relate back to date of original complaint which erroneously named parish and sheriff's office as defendants).